

## PUBLIC COMMENT

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DATE: October 16, 2007

TO: San Jose Sunshine Reform Task Force

FROM: James Chadwick, on Behalf of the San Jose Mercury News

RE: ***Enforcement Recommendations: Section 8***

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The Mercury News applauds the Administration and Accountability subcommittee for its efforts to create an effective enforcement mechanism for the San Jose Sunshine Law.

Enforcement is one of the most difficult issues encountered in any open government law, as the subcommittee members are surely aware. By designing an administrative process that gives ordinary citizens options short of going to court, the subcommittee has gone a long way toward ensuring that the ordinance will be enforceable for everyone, not just those with the means to go to court. The hard work of the subcommittee on this challenging task is evident, and is greatly appreciated by the Mercury News.

As the subcommittee and full task force works to refine this proposal, there are a number of issues that the Mercury News hopes will be considered and addressed. The Mercury News first identifies some overall concerns that it hopes will be taken into account in that process. In addition, the Mercury News has comments and proposed solutions with respect to some specific enforcement provisions.

### 1. Overall Concerns

The primary goals of the enforcement mechanism should be (1) economy; (2) prompt resolution; (3) flexibility; and (4) efficacy. The purpose of the enforcement provisions is to provide the public with an effective means of enforcing the rights created by the Sunshine Ordinance and by state law. Experience demonstrates that without effective public enforcement, compliance will be inconsistent at best. With these goals in mind, the Mercury News has the following overall concerns regarding the enforcement provisions:

- **The enforcement mechanisms should give citizens greater flexibility.** The public should not be forced into an administrative dispute resolution process. Rather, the administrative process should be an alternative to normal judicial enforcement. The ordinance should expressly provide that it can be enforced in Superior Court, or through one of the dispute resolution processes provided by the ordinance. For most people, an administrative mechanism will be preferable (particularly if neither side is represented by lawyers), because it will be simpler, cheaper, and faster than going to court. But in some cases, judicial enforcement may be the only way to ensure prompt resolution and compliance. The ordinance should expand the public's rights, not restrict them or create new hurdles to enforcement. Therefore, the ordinance should provide for judicial enforcement, whether or not a complaint has been submitted to the Open Government Officer (OGO), the Open Government Commission (OGC), the City Council, or the Rules Committee.
- **The enforcement process should be as simple as possible.** Citizens should not be required to have every complaint put through multiple enforcement mechanisms, e.g., with respect to public records, referral first to the OGO and then to the OGC Legal Evaluator ("Evaluator") if the OGO cannot resolve the issue. These should be two alternatives, either of which citizens can invoke. Each will have its role, and each will

help ensure compliance to some extent, while helping limit the number of complaints that are taken to the next level. However, if a member of the public is forced to go through multiple processes, it will confuse the process, delay the result, reduce enforcement, and therefore reduce compliance. In addition, the enforcement of all types of complaints (public records, public meetings, closed sessions) should be as similar as possible. It does not appear to be necessary to have three different processes, as now provided.

- **Enforcement needs to be expeditious.** In order to ensure an expeditious process, there need to be deadlines for the OGO, Evaluator, the OGC, and the City Council or Rules Committee to take action on citizen complaints. As currently drafted, the enforcement provisions impose no deadlines except on those who file complaints.
- **Due process should be ensured.** Due process needs to be addressed in all administrative proceedings. The basic elements of due process are notice and an opportunity to be heard. The enforcement process needs to include notice to the City department or official involved, and an opportunity to respond. It should probably also include an opportunity for the complainant to reply to the City's submission.
- **Legal representation in enforcement proceedings should be addressed.** The question of legal representation needs to be addressed. In order to keep the process simple and economical, it is probably best to prohibit either the requestor or the City from being represented by counsel in the administrative proceedings. Allowing the parties to be represented by counsel will generally result in the City being represented and the requestor not being represented, because while City departments and officials generally have access to counsel, most ordinary citizens do not. It's probably not possible to keep either side from consulting with counsel, which limits the effectiveness of any restriction, but preventing the parties from actually having counsel represent them in the administrative process would be of some benefit. In any case, the requirements need to be symmetrical—either both sides can be represented by counsel, or neither side can be.
- **Establish a presumption that an order requiring disclosure is correct.** Resort to the Superior Court to enforce an order of the OGC should not allow the City to start the process all over again, and force a citizen seeking enforcement who has invoked the administrative process to show once again from the very beginning that a violation has occurred. Therefore, in any case in which the City refuses to comply with an order of the OGC, and a member of the public is forced to bring an action in Superior Court, there should be a presumption that the order requiring disclosure is proper, and the burden should be on the City to demonstrate that the decision was clearly wrong.
- **Certain gaps need to be filled.** Nothing in the ordinance directly addresses what happens in the fairly routine situation of a City department or official simply failing to respond to a request for public records. This needs to be addressed. In addition, the enforcement provisions for public meetings do not appear to address the situation in which a member of the public is not seeking to nullify some past action taken by the policy body at issue, but rather is merely seeking to establish that a violation has occurred or may be about to occur. The Brown Act has separate ways of dealing with these situations, in particular because there may be special timing considerations when seeking to nullify past actions that are not present in other circumstances. Finally, the ordinance does not appear to address violations of the notice and agenda requirements of the ordinance.

**2. Section 8.2: Open Government Officer**

- The Open Government Officer will not be independent or objective if he or she is appointed by and answers to the City Manager. The ordinance should provide for an independent officer, appointed by the City Council, like the Independent Police Auditor.
- It is not clear what the OGO's responsibilities are with respect to serving as "staff" to the OGC.
- It is not clear what, if any, role the City Attorney would have with respect to representing or advising the OGO.

**3. Section 8.3: Open Government Commission**

- With respect to the qualifications of the OGC members, it's not clear that the OGC needs a lawyer as a member if it has a Legal Evaluator to advise it. In addition, the ordinance should specify the terms of the members.
- One of the main purposes of the enforcement provisions is to provide an alternative to having to go to court. The OGC/Legal Evaluator should be empowered to address complaints regarding violations of the Public Records Act or the Brown Act, even if the complaint does not assert a violation of the Ordinance.
- If legal representation is allowed in the administrative complaint process, then the OGC should be empowered to award attorneys' fees and costs to a citizen who prevails on a complaint.

**4. Section 8.4: Investigations**

- The OGC probably should be charged with recommending the regulations and procedures to the City Council, so that the City Council does not have to come up with them from scratch. The OGC itself will be in the best position to develop procedures.
- As noted above, the OGC and the OGO should be able to investigate complaints alleging violations of the Public Records Act and the Brown Act as well.
- Who will make the determination that a complaint warrants investigation? As noted above, if this requires a formal determination or resolution by the OGC, it will result in delay, in particular because the determination would have to be made at a public meeting of the OGC.
- It may be advisable to specify qualifications for the Legal Evaluator, in order to ensure both expertise and neutrality. For example, the ordinance should probably provide that the Evaluator must be a lawyer. It should probably also provide that the Evaluator may not be an employee of any public agency.
- It's not clear what the City Attorney's role would be in investigations. As noted above, the ordinance should clarify whether the City and the requestor are allowed to be represented by counsel. The current language would apparently prevent the City Attorney from representing City departments or officials in administrative proceedings. It's also not clear whether the City Attorney would be free to submit advice to the OGC whenever it wants, or only if invited to do so by the OGC.

**5. 8.6.010: Requests for Public Records**

- As noted above, the dispute resolution process apparently being proposed will be complex and time consuming. It appears that every complaint has to go through the following process: (1) Be submitted to the OGC; (2) be referred by official action of the OGC to the OGO; (3) be reviewed by the OGO, who will attempt to informally resolve the issue; (4) if the OGO cannot informally resolve the issue, refer the complaint back to the OGC; (5) the OGC will then refer the complaint to the Evaluator; (6) the Evaluator will investigate, reviewing the information at issue if necessary, and then submit a recommendation to the OGC; (7) the OGC may or may not hold a hearing; (8) the OGC will issue an order, and if the order is in favor of disclosure it will be sent to the Council appointee responsible for the department or official to whom the request was made; (8) if the responsible appointee refuses to disclose the information, the OGC will submit the order to the City Council; (9) if the City Council refuses to disclose the information, then and only then (apparently) can a citizen file an action in the Superior Court.
- This process imposes substantial burdens on citizens—well beyond those imposed by the Public Records Act. As it now stands, as soon as a request is denied, or if the public agency does not provide a timely response, a citizen may sue. That is often the most effective way of resolving a dispute, because it results either in settlement and disclosure or at least in a prompt court decision. The ordinance can't prevent the public from suing to enforce the Public Records Act, but it will establish the mechanism for enforcing violations of unique provisions of the ordinance itself. A sunshine ordinance should not be more difficult and burdensome to enforce than the state laws it is designed to augment and improve upon.
- Time is often of the essence, so it's vital to provide an expedited process for resolving complaints. As drafted, however, the ordinance allows for potentially interminable delays, because it does not impose any time constraints on anyone involved in the administrative review process. The only deadline imposed is that, for some reason, a citizen is given only 20 days for find a lawyer, prepare what may be an extremely complex petition, and file that petition in the Superior Court.
- The Mercury News suggests that the process for resolution of complaints should be modified as follows:
  - A person who makes a request that is denied or to which no timely response is provided should be permitted to do any of the following: (1) Submit the request to the OGC, and request the OGC to seek an informal resolution; (2) submit a complaint to the Evaluator, which will be reviewed and provided to the OGC with a recommendation for action; **or**, (3) to file a petition or complaint with the Superior Court seeking an order requiring compliance with the Sunshine Ordinance. The ordinance should make it clear that invoking one of the administrative resolution procedures will not prevent the complainant from filing an action in the Superior Court.
  - A deadline should be imposed for responses to requests for informal resolution by the OGO, not to exceed ten days.
  - A deadline should be imposed for resolution of complaints submitted to the Evaluator/OGC, not to exceed thirty days. The Evaluator/OGC process should include notice to the affected department/official, submission of a response by the department/official with delivery of the response to the complainant, submission of a reply by the complainant, a determination by the Evaluator, and a final determination by the OGC.

- Orders of the OGC should be effectively immediately, unless either the city department/official or the complainant appeals in writing to the City Council within three business days.
  - The City Council should be required to address and resolve an appeal at the next meeting occurring after the required notice period (presumably ten days).
  - If the City Council requires disclosure of any of the requested information, that decision will be final and binding on the City department or agency involved. If the City Council denies disclosure of any of the requested information, the complainant may file suit in the Superior Court.
  - All OGC orders should be addressed in public session, provided that any confidential information at issue is not disclosed unless and until there is a final determination that disclosure is required.
  - The requirement that a complainant file the petition within 20 days should be eliminated. As it now stands, the Public Records Act imposes no time limit on when an action can be commenced in Superior Court. It will often be very difficult if not impossible to find legal counsel and prepare the necessary papers, which can be quite complex, within 20 days. There is no justification for imposing this deadline on complaining parties, because the City will suffer no harm if the complainant takes longer.
- The provision describing what the Legal Evaluator needs to consider is no necessary and probably should be eliminated. A competent attorney will know what to consider and what not to consider. If this provision is retained, then it should be revised to include—at a minimum—the United States Constitution, the California Constitution, applicable federal statutes and regulations, applicable state statutes and regulations, opinions of the California Attorney General, and judicial interpretations of comparable provisions of federal, state, or local law from other jurisdictions.

**6. 8.6.020: Public and Closed Session Meetings**

- Section 8.6.020(A) raises two issues.
- First, it could be read to require that even a complaint about a violation of the Brown Act, made under state law, would have to be brought within 90 days. That is contrary to state law. The ordinance should not impose requirements on those making complaints that are more onerous than or inconsistent with the Brown Act.
  - Second, the overall structure of the public meeting enforcement provisions should probably parallel the Brown Act. One enforcement provision of the Brown Act, governing lawsuits that seek to set aside formal actions taken by the government, imposes strict limitations on which such actions may be brought. Time limitations may make sense in that context, because the City needs to be able to rely on the actions it has taken in the past in order to move forward with the work of the City. However, the Brown Act does not impose time limitations on actions that do not seek to set aside actions taken, but rather only seek a determination as to whether the Brown Act applies and has been or may be violated. A complaint about the City's failure to comply with the ordinance should recognize this distinction, and should not impose a time limit on complaints that do not seek to set aside actions taken in violation of the ordinance.
- The proposed enforcement provisions for public meetings have two main provisions: One for complaints that "a public or closed session meeting has been held or is threatened to be held by members of a policy body" in violation of the ordinance (section 8.6.020(B)), and one for complaints that a policy body discussed a topic in closed session

in violation of the ordinance (section 8.6.020(C)). Section 8.6.020(B) appears to apply only to complaints that seek to nullify or set aside formal actions that have been taken by the City. (Section 8.6.020(B)(2), (3)). Section 8.6.020(C) appears to apply only to claims that a topic was improperly discussed in closed session. Separate enforcement procedures are proposed for these two situations. These provisions raise the following concerns:

- The proposed enforcement provisions don't address all of the open meeting provisions that could be violated. For example, they don't mention notice and agenda requirements. As noted above, they also don't appear to provide for a complaint that does not seek to set aside an action taken, but rather seeks just a determination that something a policy body has done in the past or proposes to do in the future would violate the ordinance.
  - It does not appear to be necessary to have a whole different set of procedures for claims that a topic was discussed in closed session in violation of the ordinance. In either case, the same procedures can provide for an appeal to the City Council, thereby ensuring that the City Council can weigh in on the question of disclosure of any information from a closed session.
  - In addition, there is no reason that a member of the public who establishes that an action was taken in violation of the ordinance should be limited to a discretionary determination by the OGC to refer the matter to the District Attorney. The DA simply is not going to enforce the Sunshine Ordinance. With its limited resources, the District Attorney will focus its efforts on other priorities. History demonstrates that even relatively clear violations of the Brown Act have not resulted in criminal prosecutions. The public should be able to directly seek judicial enforcement of such complaints.
- As with the public record enforcement provisions, it is **vital** that the enforcement provisions for notices, agendas, and meetings should: (1) be designed to offer alternatives to judicial enforcement, but not to preclude or create additional obstacles to judicial enforcement; and (2) impose deadlines on the OGO, OGC, the City, etc., in order to ensure that the process moves forward quickly and is quickly resolved.
- The Mercury News suggests that the provisions for enforcement of the notice, agenda, an meeting requirements of the ordinance be revised as follows:
- Make the enforcement provisions applicable not just to public or closed session meetings, but also expressly applicable to the notice and agenda requirements of the ordinance as well.
  - Specifically allow for judicial enforcement without resort to the administrative dispute resolution process.
  - Create a single set of administrative enforcement procedures for **all** complaints asserting violation of the notice, agenda, or meeting requirements. Special notice and timing requirements can be added for complaints that seek to invalidate some action taken by the City. Enforcement in this area should probably parallel enforcement with regard to public records—*i.e.*, provide three separate, alternative processes, any of which a member of the public can invoke: (1) informal complaint to and resolution by the OGO; (2) formal complaint to and resolution by the Evaluator and the OGC, with provision for appeal to the City Council by either party; or (3) judicial enforcement in Superior Court.
  - Expressly allow a complaint to be brought asserting that a notice, agenda, or meeting has violated or will violate the ordinance, without seeking to set aside any related action taken by the City.

- Impose deadlines for all actions to be taken by the OGO, the OGC, the City Council, or the Rules Committee, for all steps in the dispute resolution process.

**7. Conclusion.**

The enforcement recommendations will be critical to the effectiveness of the Sunshine Ordinance. The Mercury News appreciates the attention of subcommittee and the Task Force to these concerns.